

3420

THE STATE OF ALABAMA,

Baldwin County.

CIRCUIT COURT

Fall

Term, 19 61

On Appeal From County Court

THE STATE vs. J.E. BROWN

The State of Alabama, by its Solicitor, complains of J.E. BROWN

that
in said county and within twelve months before the commencement of this prosecution he did
sell, furnish or give alcoholic beverage to wit beer to *Rennie Bazington*
a minor,

contrary to law and against the peace and dignity of the State of Alabama.

James A. Hendrix, Solicitor.

We The Jury
find guilty ^{Defendant}
Charged.

fix the fine at
\$50⁰⁰ Dollars

A. D. McKinley
Foreman

No. _____

The State of Alabama

Baldwin County

CIRCUIT COURT

The State

vs.

J. E. BROWN

Charge:

COMPLAINT

Filed 9-27-61, 19__

Alice J. Luck
Clerk.

MOORE PRINTING COMPANY - BAY MINETTE, ALA.

APR 17 1962

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1961-62

1 Div. 889

J. E. Brown

v.

State

Appeal from Baldwin Circuit Court

HARWOOD, PRESIDING JUDGE

This prosecution originated in the County court of Baldwin County, the appellant having been found guilty in that court upon an affidavit signed by W. O. Garner that he did " * * transport, sell, have in his possession or under his control illegally, vinous spiritous or malt liquors * * *." Upon being adjudged guilty in the County court, this appellant perfected

2.

his appeal to the Circuit Court of Baldwin County.

In the Circuit Court the Solicitor filed a complaint which charged that the appellant did " * * * sell, furnish or give alcoholic beverage to wit; beer to Ronnie Boyington, a minor, contrary to law * * *."

A motion to quash the Solicitor's complaint was filed on the grounds that said complaint was a departure from the original affidavit, and that the appellant was charged in the complaint with a new and distinct offense not embraced in the affidavit filed in the County court.

Upon the court overruling the appellant's motion to quash the Solicitor's complaint, a demurrer was filed to the complaint, some of the grounds of the demurrer being the same as those above mentioned as grounds for the motion to quash. This demurrer was likewise overruled.

It further appears from the record that the appellant duly excepted to the court's action in compelling him to strike from the last 24 members of the jury panel, there being available the entire panel consisting of 48 members. In this connection, the court stated:

"THE COURT: Let the record show that the Court is very anxious to expedite the business of the Court, and as a general rule the Attorney for the Defendant will take from 30 to 45 minutes to strike a jury, and in order to save time, the Court is limiting them to 24.

"MR. HORNE: And we except."

It is obvious that the affidavit upon which this appellant was prosecuted in the County court was so drawn as to charge the appellant with violation of Sec. 98, Tit. 29, Code of Alabama 1940, which Section makes it unlawful for any person to sell, offer for sale, possess, or give away prohibited liquors and beverages.

It is equally obvious that the Solicitor's complaint was drawn under Sec. 36(2), Tit. 29, Code of Alabama 1940, which makes it unlawful for any manufacturer, wholesaler, or distributor of malt or brewed beverages "to sell, furnish, or give any beverage * * * to any minor * * *."

3.

The offense denounced by Sec. 36(2) supra, is a separate and distinct offense from that denounced by Sec. 96, supra, with differing constituent elements.

Clearly, therefore, the Solicitor's complaint constituted a material departure from the affidavit filed in the County court, and the motion to quash the Solicitor's complaint should have been sustained.

The solicitor's complaint, stating a new and different cause of action, unsupported by an affidavit charging the offense set forth in the complaint, was nothing more than a mere statement by the Solicitor. Echols v. State, 16 Ala. App. 138, 75 So. 814; Broglan v. State, 17 Ala. App. 403, 86 So. 164; Green v. State, 22 Ala. App. 56, 112 So. 98; Hayes v. State, 33 Ala. App. 178, 31 So. 2d 306. See also, Moore v. State, 165 Ala. 107, 51 So. 357.

Tit. 30, Sec. 60, Code of Alabama 1940, provides as follows:

"In every criminal case the jury shall be drawn, selected and empaneled as follows: Upon the trial by jury in any court of any person indicted for a misdemeanor, or felonies not punished capitally, or in case of appeals from lower courts, the court shall require two lists of all the regular jurors empaneled for the week, who are competent to try the defendant, to be made and the solicitor shall be required first to strike from the list the name of one juror and the defendant shall strike two, and they shall continue to strike off names alternately until only twelve jurors remain on the list, and these twelve thus selected shall be the jury charged with the trial of the case."

In Lucas v. State, 22 Ala. App. 632, 118 So. 765, the appellant, charged with a misdemeanor, was required, over his objections to strike from the first 24 names on the jury list which contained 37 names of regular jurors empaneled for the week, not at the time engaged in the performance of any other duty. An exception was reserved to the action of the court in the above instance. Writing to this point, the late Judge James Rice stated:

"In the face of the plain terms of the statute quoted, we must hold the said action of the court reversible error."

Certainly, this principle would apply to the present case where this appellant was compelled to strike from the last 24

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members of a jury panel of 48 names.

For the errors above pointed out, this judgment must be reversed. Other points are argued in the appellant's brief. They are not likely to arise in another trial of this case, and we therefore pretermitt a discussion of them.

REVERSED AND REMANDED.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

1st Div., No. 889

J. E. Brown Appellant.,

v.

The State Appellee.,

From Baldwin Circuit Court

The State of Alabama, }
City and County of Montgomery. }

I, Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama, do hereby certify that the foregoing pages numbered from one to 4 inclusive, contain a full, true and correct copy of the opinion of said Court of Appeals in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Charles Bricken, Jr., Clerk of the Court

of Appeals of Alabama, at the Capitol, this the

17th day of April, 1962

Charles Bricken, Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

1st Div., No. 889

J. E. Brown
Appellant

vs.

The State
Appellee

From Baldwin Circuit *Court.*

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

October Term, 19 62

To the Clerk of the Circuit Court of Baldwin County, Greeting:

Whereas, the Record and Proceedings of the Circuit Court of said County, in a certain cause lately pending in said Court between

J. E. Brown, Appellant,
and

The State, Appellee,

wherein by said Court, at the Term, 19 , it was considered adversely to said appellant, were brought before our Court of Appeals, by appeal taken, pursuant to law, on behalf of said appellant.

Now, it is hereby certified, That it was thereupon considered by our Court of Appeals on the 17th day of April 19 62, that said judgment of said Circuit Court be reversed and annulled, and the cause remanded to said Court for further proceedings therein, ~~and that it was further considered that the appellant pay~~

~~the costs remaining from said appeal in this Court and in the Court below~~

Witness Charles Bricken, Jr., Clerk of the Court
of Appeals of Alabama, at the Capitol, this the
17th day of April 19 62

Charles Bricken, Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

October Term, 19 62

1st Div. No. 889

J. E. Brown

Appellant,

v.

The State

Appellee.

From Baldwin Circuit Court

CERTIFICATE OF
REVERSAL

The State of Alabama,

Baldwin County.

} Filed

this 18 day of Apr 19 62

Alice J. Black
Clerk

THE STATE OF ALABAMA

IN THE CIRCUIT COURT.

Baldwin County.

We J.E. Brown and

_____ agree to pay to the State of Alabama the
sum of Three Hundred and no/100 - - - - - Dollars, unless the said

_____ J.E. Brown _____ appears at the next
term of the Circuit Court of _____ Baldwin _____ County, and from term to term thereafter
until discharged by law, to answer a criminal prosecution for the offense of _____

Vio. A.B.C. Law

And we, and each of us, hereby waive all exemptions we may have to any personal property under the Constitution and Laws of the State of Alabama as to the collection of the penalty of this bond.

Witness our hands and seals this 27 day of September, 1961

The condition of the above obligation is such that, whereas the above bound_____

J. E. Brown was duly convicted in the Circuit Court of Baldwin County on the 27 day of September, 1961, of the above stated offense, and has duly applied for and obtained an appeal from said conviction and sentence to the Court of Appeals for the State of Alabama, and the amount of his appeal bond has been duly and legally fixed at said above stated sum:

Now, therefore, if the said J.E. Brown

shall appear at the next term of the Circuit Court of Baldwin County, and from term to term thereafter until discharged by law, and abide the judgment of the said Court of Appeals for the State of Alabama, then this obligation to be void and of no effect; otherwise to remain in full force and effect.

J. A. Brown (Seal.)
J. A. Brown (Seal.)
J. A. Brown (Seal.)

(Seal.)

_____ (Seal.)

Approved this 27 day of Sept, 1961

Reice L. Duck, Clerk.

No. _____

THE STATE OF ALABAMA

_____ County.

CIRCUIT COURT OF

_____ County

**THE STATE
vs.**

**APPEAL BOND TO COURT OF
APPEALS
CRIMINAL CASES**

Filed in office this the 27 day of

Sept, 1961

Wing J. Duck
Clerk.

THE STATE OF ALABAMA }
 Baldwin County - Circuit Court }

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the
 27th day of September, 1961 ~~Monday~~ ~~1961~~, in a cer-

tain cause in said Court wherein STATE OF ALABAMA

Plaintiff, and J.E. BROWN

Defendant, a judgement was rendered against said

J.E. BROWN

to reverse which Judgment, the said J.E. Brown

applied for and obtained from this office an APPEAL, returnable to the next

Term of our COURT OF APPEALS, Court of the State of Alabama, to be held at Montgomery,

on the day of , 195 next, and the necessary bond

having been given by the said J.E. Brown

with S.J. Brown, sureties,

Now, You Are Hereby Commanded, without delay, to cite the said

State of Alabama, or James A. Hendrix, Circuit Solicitor

, attorney, to appear at the next Term of our

COURT OF APPEALS,
 said Supreme Court, to defend against the said Appeal, if they think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 12

day of Dec. , A. D., 1961

Attest:

Alice J. Duck, Clerk.

I hereby accept
service hereon on
this 12th day of
Dec. 1961

James H. Hendrix

3420

CIRCUIT COURT
Baldwin County, Alabama

State

Vs. Citation in Appeal

J. E. Brown

Issued.....day of....., 195.....

12 Dec 61

Dear Frank;

Clerk & Court
Notified today to
file appeal papers.
Please sign attached
Notice & Appeal and
return to me and I
will take over to
Mrs Duck.

Thanks -
Ken Cooper

STATE OF ALABAMA,)
Plaintiff,)
Vs)
J. E. BROWN,)
Defendant.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

Criminal Division

Case No. 3420

NOTICE OF APPEAL

Comes now the Defendant in the above styled cause and gives notice of appeal from the judgment of the Baldwin County Circuit Court rendered on the 27th day of September, 1961, and also from the judgment of said Court overruling his motion for a new trial entered on the 24th day of October, 1961, to the Court of Appeals of Alabama.

FILED

DEC 16 1961

ALICE J. DUCK, CLERK
REGISTER

Frank J. Harne
Attorney for Defendant

Kenneth Cooper
Attorney for Defendant

W. Eugene Strull
Attorney for Defendant

STATE OF ALABAMA,)
Plaintiff,)
Vs)
J. E. BROWN,)
Defendant.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

Criminal Division

Case No. 3420

NOTICE OF APPEAL

Comes now the Defendant in the above styled cause and gives notice of appeal from the judgment of the Baldwin County Circuit Court rendered on the 27th day of September, 1961, and also from the judgment of said Court overruling his motion for a new trial entered on the 24th day of October, 1961, to the Court of Appeals of Alabama.

Frank H. Hame
Attorney for Defendant

Kenneth Cooper
Attorney for Defendant

W. Anglen - Webb
Attorney for Defendant

FILED

DEC 16 1961

ALICE J. DUCK, CLERK
REGISTER

FILED

DEC 16 1961

ALICE J. DUCK, CLERK
REGISTER

STATE OF ALABAMA,)
Plaintiff,)
Vs)
J. E. BROWN,)
Defendant.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
Criminal Division

Case No. 3420

NOTICE OF APPEAL

Comes now the Defendant in the above styled cause and gives notice of appeal from the judgment of the Baldwin County Circuit Court rendered on the 27th day of September, 1961, and also from the judgment of said Court overruling his motion for a new trial entered on the 24th day of October, 1961, to the Court of Appeals of Alabama.

FILED

DEC 16 1961

ALICE J. DUCK, CLERK
REGISTER

Frank G. Hame
Attorney for Defendant
Kenneth Cooper
Attorney for Defendant
Frank Wells
Attorney for Defendant

____ Div. No. ____

CERTIFICATE OF APPEAL. (Criminal Cases.)

No. ____

____ Baldwin ____ County, Circuit Court

____ J.E. BROWN ____ ,
Appellant
VS.

The State of Alabama,
Appellee

The State of Alabama,
____ Baldwin ____ County, The Circuit Court of ____ Baldwin ____
County.

I, Alice J. Duck , Clerk of the Circuit Court
of ____ Baldwin ____ County in and for said County and State, do
hereby certify that in the above stated case, which was tried and
determined in this Court on the 27 day of September 1961, and
the defendant convicted by a Jury of the offense of Vio. A.B.C. Law of
____ , and that on the 27 day of September 1961 ,
said defendant was sentenced to a ~~term of~~ Fine of \$50.00 and cost
____ , which said sentence was suspended
pending an appeal to the Court of Appeals ____ Court of Alabama.

I further certify that on this the 16 day of Dec ____
1961 , the defendant gave notice in writing of an appeal to the
Court of Appeals ____ Court of Alabama.

Witness my hand and the seal of this Court, this the 12
day of December 19 61 .

____ Alice J. Duck ____
Clerk of Circuit Court of
____ Baldwin ____ County, Alabama,

James Harris

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11/11/11

The State
vs
J. E. Brown } Circuit Court.

now comes the defendant and files this his motion to quash the complaint heretofore filed in the cause and as ground therefor assigns the following:

1. That said complaint is a departure from the original affidavit.

2. That the affidavit in the cause charges the defendant with the offense ~~with~~ described in sec. 98 of Title 29 of the Code of Alabama for 1940 and the complaint seeks to charge the defendant with the offense described in Title 29 - Sec 36, Sub Sec 2. of the Code of Alabama for 1940, as amended.

3. That defendant is charged ^{in the complaint} with a new and distinct offense not embraced in the affidavit filed in the Cause.

4. That by the complaint the defendant is called on to defend an entirely different offense to the offense with which he was charged in the affidavit.

J. E. Brown

State of Alabama
Baldwin County.

~~You come~~ Before me
The undersigned authority in and
for said State and County personally
appeared J. E. Brown who being duly
sworn says: That the matters set out
in the foregoing motion are true
and correct.

J. E. Brown

sworn to and subscribed before me this
29, day of Sept. 1961 J. E. Brown
Judge of said Court

filed

9.29.61

W. J. H. H. H.
Clerk

STATE OF ALABAMA,)
Plaintiff,)
Vs)
J. E. BROWN,)
Defendant.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

Criminal Division

Case No. 3420

DEMURRERS

Comes now the Defendant in above styled cause and demurs to the Solicitor's Complaint filed in this cause, and assigns as grounds of demurrer the following errors:

FIRST:

That the affidavit filed in this cause in the County Court charges the offense described in Section 98, Title 29, Code of Alabama, 1940, and the Solicitor's Complaint seeks to charge the Defendant with the offense described in Section 36(2), Title 29, Code of Alabama, 1940, as Amended.

SECOND:

That the said complaint filed by the Solicitor is a departure from the original affidavit filed in the County Court.

THIRD:

That the Defendant is charged in the Solicitor's Complaint with a new and distinct offense not embraced in the affidavit filed in this cause in the County Court.

FOURTH:

That by the Solicitor's complaint the Defendant is called upon to defend an entirely different offense to the offense with which he was charged by the affidavit in the County Court.

FIFTH:

That said Solicitor's complaint is based on an affidavit which charges no offense.

SIXTH:

That said Solicitor's complaint fails to charge an offense.

SEVENTH:

That said Solicitor's complaint fails to charge the Defendant with being an Alcohol Beverage Control Board licensee.

Filed 9-27-61
A. J. J. J. J.

Kenneth Cooper
Frank D. House
Attorneys for Defendant.

State
VS
J. E. Brown

JURY LIST - FALL TERM - SEPTEMBER 25, 1961

1. Allegri, Americo G., Jr., Bookkeeper, Loxley
2. Anderson, William F., Merchant, Foley
3. Benton, William, Auditor, Spanish Fort- Daphne
4. Beasley, Wilson C., Store Owner, Bay Minette
5. Blackman, W.K., Farmer, Foley
6. Boeschen, Arthur, Farmer, Bay Minette
7. Booth, Charley, Farmer, Fairhope
8. Bryant, George E., Farmer, Stockton
9. Bryars, Ewing E., Reserve Fleet, Bay Minette
10. Cain, Hurman L., Mechanic, Bay Minette
11. Coley, Luke Mc., Fisherman, Gulf Shores
12. Conway, Charles, Brookley Field, Bay Minette
13. Dean, Earl, Farmer, Bay Minette
14. Early, L.J., Timber & Lumber, Foley
15. Ebentheuer, Henry A., Trk. Driver, Elberta
16. Flint, R.D., Farmer, Summerdale
17. Gates, Amon M., Contractor, Fairhope
18. Grantham, Houston D., Farmer, Mag., Spgs.
19. Harper, Cecil, Brookley Field, Bay Minette
20. Hayes, Henry Clayton, Farmer, Robertsedale
21. Horne, Thomas B., Fleet, Crossroad
22. Humphrey, J.B., Farmer, Belforest
23. Kinsey, Daniel, Insurance, Foley
24. Langham, Aubrey, Farmer, Loxley
25. McKinley, Alex, D., Post Office, Bay Minette
26. Mauch, Arthur, Merchant, Fairhope
27. Miller, R. Cecil, Implement Dealer, Foley
28. Miller, Henry C., Tfg. Represent, Spanish Fort
29. McGowan, Ed., State Employee, Bay Minette
30. Moore, Louis Davis, Farmer, Summerdale
31. Motherhead, Gordon, Oil & Gas, Bay Minette
32. Nail, Cecil, Contractor, Bay Minette
33. Nail, Glenn, Merchant, Robertsedale
34. Page, Jack, Clerk, Bay Minette
35. Robinson, John B., Farmer, Foley
36. Roberson, Mutt, Laborer, Robertsedale
37. Russell, Cecil, Filling Station, Robertsedale
38. Schad, Harry, Clerk, Foley
39. Still, Harry, Merchant, Bay Minette
40. Sharretts, Walter J., Farmer, Summerdale
41. Sheppard, Lloyd, Farmer, Foley
42. Smith, John E., Salesman, Bay Minette
43. Teem, Kennech, Linesman, Foley
44. Vargo, John, Farmer, Elberta
45. Waters, J. Douglas, Farmer, Gateswood
46. Weekley, James, Civil Service, Stapleton
47. Wilsey, James, Clerk, Loxley
48. Wilsey, Murry Emmett, Farmer, Robertsedale

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